

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 8, 2008 Session

LAURA HAMMOND WILLMORE v. HAROLD E. WILLMORE, III

Appeal from the Chancery Court for Sumner County
No. 2006D-413 Tom E. Gray, Chancellor

No. M2007-02146-COA-R3-CV - Filed May 6, 2009

The parties divorced after a marriage of over twenty years and the trial court ordered the husband to pay the wife alimony *in futuro*. The husband argues on appeal that the trial court abused its discretion in awarding that type of alimony because the wife did not request alimony *in futuro*, but specifically asked at trial for rehabilitative alimony. The husband also argues that the amount of alimony awarded was excessive. We affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

M. Allen Ehmling, Gallatin, Tennessee, for the appellant, Harold E. Willmore, III.

Grayson Smith Cannon, Goodlettsville, Tennessee, for the appellee, Laura Hammond Willmore.

OPINION

I. Marriage and Divorce

Laura Hammond Willmore (“Wife”) and Harold E. Willmore, III (“Husband”) were married on October 28, 1986. Two children were born of the marriage, only one of whom was a minor at the time of the proceedings below. The marital household also included Wife’s adult daughter from a previous marriage who had been adopted by Husband and the daughter’s own infant daughter. The Juvenile Court had given the parties guardianship of the child.

On October 30, 2006, Wife filed a Complaint for Separate Maintenance. She alleged that Husband had fled from the marital home a month earlier and that he had been guilty of inappropriate marital conduct. She requested a legal separation, sole custody of the minor child, equitable division

of marital property and that “Wife be awarded spousal and child support, both temporary and permanent.” A Temporary Parenting Plan filed on the same date also included a request for payment of temporary child support by Husband in accordance with the guidelines.

The parties subsequently entered into an agreed order which gave temporary custody of the parties’ minor son to Wife. It also provided that Husband would pay household expenses including the mortgage and utilities on the marital home, health and auto insurance, and groceries for the family.

Husband filed an Answer and Counter-Complaint on December 8, 2006, in which he asked for an absolute divorce rather than a legal separation. Wife responded with an Amended and Supplemental Complaint for Absolute Divorce in which she alleged that Husband was guilty of adultery and asked that “Husband be ordered to pay alimony and child support, both pendente lite and permanent.”

The final hearing on this matter was conducted on August 9, 2007. When the hearing began, the parties stipulated that Wife should be awarded the divorce on the ground of inappropriate marital conduct. They also agreed on the division of certain personal property, including vehicles for each of them and for their two sons. Thereafter, the proceeding focused on issues of alimony and valuation of real property.¹

The proof showed that Husband worked for Willmore Tool & Die, a company owned by his father. W-2 forms entered into the record showed that he earned wages from that job of \$ 94,171 in 2004 and \$ 85,727 in 2005. He also enjoys company-funded individual medical insurance and has the use of a company truck, which is titled in the name of his brother and sister, but which he uses for both business and family purposes. He is reimbursed from company funds for all the gas he uses.

Wife testified that she had done a number of “odds and ends jobs” during the marriage. For the past five years, she had worked three days a week as a nurse-sitter for an elderly woman. She earned about \$2,000 a month for those services. At some point after Husband left the marital home, Wife started a business to clean up work sites after construction, which generated gross income of \$8,873 between January and August of 2007 and net income of \$3,152. Wife testified that the work was done by herself, her daughter, her son, her son’s girlfriend, and two other people she hired.

The proof showed that Wife suffered from a number of medical problems, including migraine headaches and joint pain. She has also undergone spinal surgery and breast surgeries, with complications following some of those surgeries. Wife volunteered the information that she had been diagnosed with fibromyalgia, but Husband’s attorney raised a hearsay objection to that

¹One issue which was the subject of much testimony at trial involved a piece of land the couple had acquired from Husband’s parents, and which Husband subsequently quitclaimed to the parents, forging Wife’s signature to the quitclaim deed. There are no issues on appeal involving that property.

testimony. The trial court sustained the objection.

Although the parties enjoyed a fairly comfortable income during the course of their marriage, the proof showed that they had not accumulated much in the way of assets. The fair market value of the marital home at the time of trial was \$255,000, and it was encumbered by a mortgage with a current balance of about \$250,000. Thus, for all practical purposes there was no equity in the home for the parties to divide. Other assets included vehicles, a horse that wife owned, and husband's IRA, which had a value of \$2,360. The total financial assets of the parties amounted to less than \$10,000, and Husband testified that he often used credit cards to pay regular monthly bills. One reason for the lack of marital assets was Wife's passion for horses, which she attempted to satisfy by turning it into a business. The proof showed that Wife lost more than \$40,000 over three years in this enterprise.

During Wife's testimony, her attorney asked her about alimony. She testified that she was asking for rehabilitative alimony of \$1750 per month for eighty-four months and payment by Husband of her COBRA health insurance for three years following the final decree of divorce. The same requests were set out in a document entitled "Wife's Request for Relief," which was entered into the record.

At the conclusion of proof, the court announced its decision from the bench. In accordance with the parties' stipulation, the court awarded Wife an absolute divorce on the ground of inappropriate marital conduct. Wife was named the primary residential parent of the parties' minor son, who was seventeen years old at the time, and Husband was ordered to pay \$870 per month in child support in accordance with the guidelines.

The court awarded the marital home to Wife. All right, title and interest in the home was ordered to be divested from Husband, and Wife was made solely responsible for the monthly mortgage payment of \$1,869. The court also awarded Wife a GMC truck and gooseneck trailer, and declared her responsible for the outstanding indebtedness on the vehicle, which carried a monthly obligation of \$400. Husband was awarded his tools, his IRA, and the company truck which the court had declared to be marital property.

Turning to the question of spousal support, the court noted the long duration of the marriage (over twenty years), the limited size of the marital estate, and the Wife's continuing financial obligations. The court also discussed the affidavits of income and expense submitted by both parties, and concluded that Wife had a need for financial support and that Husband had the ability to pay such support. The court also noted that Wife's medical conditions could limit her earning ability.

The court accordingly awarded Wife \$2,200 per month in alimony *in futuro* until June of 2008 (when her son would reach the age of eighteen and Husband's child support obligation would expire). The alimony was to increase thereafter to \$2,500 per month "to terminate upon the death of the obligor or the death of the recipient and to terminate upon the marriage of the recipient." The court also ordered Husband to maintain COBRA insurance on Wife for twenty-four months. The

court further announced that it would award Wife some of the attorney fees she incurred. The final decree of divorce, filed on August 22, 2007, memorialized the court's decision and included an award to Wife of attorney fees in the amount of \$5,200. This appeal followed.

II. THE TYPE OF ALIMONY AWARDED

In reviewing the trial court's order, we must accord a presumption of correctness to the court's findings of fact, and we may not reverse those findings unless the evidence preponderates against them. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). Our review of legal issues is *de novo*, but without a presumption of correctness. *Dube v. Dube*, 104 S.W.3d 863, 867 (Tenn. Ct. App. 2002).

Our courts are authorized to order the payment of spousal support to the disadvantaged spouse "in any action for divorce, legal separation, or separate maintenance." Tenn. Code Ann. § 36-5-121(a). The statute sets out four separate types of spousal support which the courts may award: alimony *in futuro*, rehabilitative alimony, transitional alimony, and alimony *in solido*. Tenn. Code Ann. § 36-5-121(d)(1). "Alimony *in futuro*, also known as periodic alimony, is a payment of support and maintenance on a long term basis or until death or remarriage of the recipient." Tenn. Code Ann. § 36-5-121(f)(1). Rehabilitative alimony is awarded for the purpose of giving the obligee spouse the resources he or she may need in order to become economically rehabilitated. As our legislature has explained,

Rehabilitative alimony is a separate class of spousal support, as distinguished from alimony *in solido*, alimony *in futuro*, and transitional alimony. To be rehabilitated means to achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse's standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

Tenn. Code Ann. § 36-5-121 (e)(1).

The support provided by rehabilitative alimony is intended to help the disadvantaged spouse become self-sufficient by allowing him or her to acquire additional job skills, education or training. *Kinard v. Kinard*, 986 S.W.2d 220, 234 (Tenn. Ct. App. 1998); *Loria v. Loria*, 952 S.W.2d 836, 838 (Tenn. Ct. App. 1997). Rehabilitative alimony is awarded for a limited period of time, because once an obligee has become successfully rehabilitated, there should be no further need for spousal support.

Our legislature has expressed a preference for rehabilitative alimony whenever rehabilitation is possible. Tenn. Code Ann. § 35-5-121(d)(2). However, "[w]here there is relative economic disadvantage and rehabilitation is not feasible...the court may grant an order for payment of support and maintenance on a long-term basis or until death or remarriage of the recipient." Tenn. Code Ann. § 36-5-121(d)(3). As this court has stated, "[t]he statutory preference for rehabilitative support

does not entirely displace other forms of spousal support when the facts warrant long term or more open-ended support.” *Anderton v. Anderton*, 988 S.W.2d 675, 682 (Tenn. Ct. App. 1998).

Husband argues that the trial court erred in awarding Wife alimony *in futuro* because he did not receive proper notice of her intention to seek such alimony, and because at trial she only asked for rehabilitative alimony. However, Wife requested “spousal and child support, both temporary and permanent” in her Complaint for Separate Maintenance, and she renewed that request in her Amended and Supplemental Complaint for Absolute Divorce.

Husband admits that he received notice that Wife was requesting the court to order him to pay alimony. It is also beyond dispute that the court is authorized to award alimony “according to the nature of the case and the circumstances of the parties.” Tenn. Code Ann. § 36-5-121(a). The requests for alimony in Wife’s pleadings therefore constitute adequate notice to Husband that alimony *in futuro* was among the possibilities that might be considered by the trial court. We do not consider Wife’s testimony in regard to rehabilitative alimony to be a waiver of entitlement to any other form of alimony which the trial court might determine was appropriate under the circumstances.

Our legislature has set out a list of factors for the court to consider when making alimony determinations. Tenn. Code Ann. § 36-5-121(i) reads,

In determining whether the granting of an order for payment of support and maintenance to a party is appropriate, and **in determining the nature**, amount, length of term, and manner of payment, the court shall consider all relevant factors, including:

(1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;

(2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;

(3) The duration of the marriage;

(4) The age and mental condition of each party;

(5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;

(6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;

(7) The separate assets of each party, both real and personal, tangible and intangible;

(8) The provisions made with regard to the marital property, as defined in § 36-4-121;

- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties. (Emphasis added).

Although the trial court did not specifically refer to this statute in its ruling from the bench, the reasons it set out for its decision clearly coincide with several of the statutory factors. The court noted that this divorce followed a marriage of long duration (factor 3), that Wife suffered from chronic physical conditions that would likely affect her earning ability (5), and that because of the relatively small size of the marital estate (8), its division left Wife left without financial assets to fall back upon. Although the court did not refer to factor (11) in discussing the alimony award, the parties stipulated as to Husband's fault for the failure of the marriage.

No proof was presented as to Wife's prior education or training, or as to any possibility of any sort of future education or training that would enable her to improve her earning potential. Although the forty-three year old woman worked at a variety of jobs during the course of the marriage, most of her work entailed unskilled labor. Husband argues that since Wife has been earning about \$2,000 a month caring for an elderly lady, and since she has also begun a construction site cleaning business, her prospects for rehabilitation were good. He also argued that her request for rehabilitative alimony amounted to an admission that she could become self-sufficient in seven years.

Wife testified that she hoped to establish a successful cleaning business, but her attorney suggested during oral argument that she was a very optimistic person who was perhaps a victim of her own "unwarranted optimism." He also pointed out that Wife would be unlikely to enjoy any benefits from her self-employment such as paid holidays, sick leave or a retirement account. Wife testified that she still suffered from migraine headaches and joint pain, and that her spinal cord surgery had slowed her down and placed limits on her activities. We conclude that the evidence does not preponderate against a finding that it was not feasible for Wife to achieve rehabilitation to the statutory standard, *i.e.*, the standard of living enjoyed during marriage or the standard Husband can enjoy.

Husband objects to the trial court's consideration of Wife's medical condition because she did not offer expert medical proof as to that condition. Husband argues that it was error to allow her to testify at all about medical matters "as to which she has no expertise, and to rely upon that testimony as a major factor in the making of an alimony award."

While Tenn. Code Ann. § 36-5-121(i)(5) allows the court in alimony cases to consider “[t]he physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease,” it does not require expert testimony to prove such conditions. Of course, the introduction of expert testimony may reinforce or strengthen a party’s proof of physical condition, but individuals are entitled to testify as to their own perceptions of their condition, and the trial judge who has the opportunity to observe the manner and demeanor of the witness may evaluate the weight, faith, and credit to be given to such testimony. *Freeman v. Freeman*, 147 S.W.3d 234, 241 (Tenn. Ct. App. 2003); *Ricketts v. Ricketts*, No. M2005-00022-COA-R3-CV, 2006 WL 2842717 at *8 (Tenn. Ct. App. Oct. 3, 2006) (no Rule 11 perm. app. filed) (Husband and Wife both testified as to their own physical conditions, but the trial court declined to grant Wife alimony *in futuro* because it found her testimony less credible than Husband’s).

Wife testified as to several health problems she had suffered, and to a medical history that included spinal surgery. Husband confirmed that Wife had undergone surgery and was questioned further about her health:

- Q. She’s always suffered from bad headaches, from migraine headaches, hasn’t she?
- A: That’s right.
- Q. And there’s some things she’s limited in doing now as far as lifting heavy things; is that true? She’s obviously a hard worker, trying to work two jobs now. But she’s got some physical limitations, doesn’t she?
- A. Don’t we all.
- Q. Well, that’s not what I’m asking you. Your wife has some physical limitations?
- A. Yes, she does have some, but I do too.

In light of the testimony of both Wife and Husband, it is clear that the evidence does not preponderate against the trial court’s finding that Wife suffers from health problems which could limit her earning ability, thereby making rehabilitation less likely.

Our courts have declared that “[a] trial court has wide discretion in determining whether an award of alimony should be rehabilitative or *in futuro*, as well as wide discretion in the amount of alimony awarded.” *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn. 2004); *Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn. 2000); *Kinard v. Kinard*, 986 S.W.2d at 234. Further, “[a]ppellate courts are generally disinclined to second-guess a trial judge’s spousal support decision unless it is not supported by the evidence or is contrary to the public policies reflected in the applicable statutes.” *Id. Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994).

The evidence in the record did not show that Wife had potential for rehabilitation through additional training or education, and it indicated that it was unlikely that she would be able to achieve a standard of living by her own efforts “reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the

other spouse.” Tenn. Code Ann. § 36-5-121 (e)(1). Accordingly, we affirm the trial court’s award of alimony *in futuro*.

III. THE AMOUNT OF ALIMONY AWARDED

Husband contends that the trial court awarded an excessive amount of alimony to Wife. When addressing that argument, the factors set out in Tenn. Code Ann. § 36-5-121(i), which we have recited above, remain relevant. We must also consider the demonstrated need of the obligee and the obligor’s ability to pay, which our courts have said many times are the most important factors to consider when determining an appropriate amount of alimony. *Robertson v. Robertson*, 76 S.W.3d 337, 342 (Tenn. 2002); *Bogan v. Bogan*, 60 S.W.3d at 730; *Anderton v. Anderton*, 988 S.W.2d 675, 683 (Tenn. Ct. App. 1998); *Lancaster v. Lancaster*, 671 S.W.2d 501, 503 (Tenn. Ct. App. 1984).

Husband argues that the court’s decree leaves him with less income than Wife and that this is unfair. Our Supreme Court has stated that “alimony should be awarded in such a way that the spouses approach equity.” *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn. 1995). Further, “in marriages of long duration, to which each party made a significant contribution, it is inequitable to compel one party to revert to a marginal standard of living, while the other party enjoys a far more luxurious standard, comparable to the one the parties became accustomed to during the marriage.” *Wood v. Wood*, No. M2003-00193-COA-R3-CV, 2004 WL 30088745 at *8 (Tenn. Ct. App. Dec. 28, 2004) (Tenn. R. App. P. 11 application denied June 27, 2005). Also, “the amount of alimony should be determined so that the party obtaining the divorce is not left in a worse financial situation than he or she had before the opposite party’s misconduct brought about the divorce.” *Aaron v. Aaron*, 909 S.W.2d at 410-411; *Shackleford v. Shackelford*, 611 S.W.2d 598, 601 (Tenn. Ct. App. 1980).

Husband calculates that in first year of the alimony award, the combination of \$2,200 in monthly alimony, his monthly child support obligation of \$870 and his payment of \$503 per month for Wife’s COBRA insurance would leave him with only \$4,427 per month for living expenses, while Wife’s earned income, together with the child support and insurance she receives will give her about \$6,775 per month in gross income.

Husband’s calculations are somewhat misleading. He bases them on his own gross monthly income of \$8,000 as shown on the Child Support Worksheet, Wife’s monthly income of \$2,000 from that same sheet, and the gross revenues of Wife’s cleaning business for first eight months of the year, which average out to \$1,202 per month. However, the revenue from Wife’s business is not comparable to her personal gross income, because it does not take into consideration the operating expenses of the business, which include payroll, workers compensation insurance, supplies, diesel and gas. Using all of Husband’s assumptions, but plugging Wife’s monthly net business income of \$394 into the equation in place of her business revenue of \$1,202 would give her \$5,967 of gross monthly income in the first year, rather than \$6,775.

Our examination of the record indicates that the alimony ordered by the court would allow the parties to enjoy roughly comparable standards of living, so long as both continue to work and to earn income comparable to the amount they were earning at the time of trial. Even if Wife's nominal income under the decree appears to be somewhat higher than Husband's during the first few years, we note that some of the income Husband complains about paying is designated for the support of the parties' minor child. Further, at the time of the hearing, Husband and Wife were 46 and 43 years of age, respectively. Assuming normal life expectancies for both, one would expect many years during which Husband would not have to pay, and Wife would not receive, child support or COBRA insurance.

As we noted above, the amount of alimony awarded is largely within the discretion of the trial court, *Aaron v. Aaron*, 909 S.W.2d at 410; *Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. Ct. App. 2001). Since the trial court's award leaves the parties in roughly comparable financial conditions, with Husband probably retaining a slight advantage due to his lesser obligations and his somewhat greater income after the expiration of his child support and COBRA obligations, we find no basis to disturb the trial court's alimony award.

IV. ATTORNEYS' FEES ON APPEAL

Wife has also asked us to award her the attorney fees she incurred on appeal. Under Tenn. Code Ann. § 36-5-103(c), this court has the discretionary authority to award such fees in proper cases. *See Holt v. Holt*, 995 S.W.2d 68, 78 (Tenn. 1999); *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995). "In determining whether an award for attorney's fees is warranted, we should consider, among other factors, the ability of the requesting party to pay his or her own attorney's fees, the requesting party's success on appeal, and whether the requesting party has been acting in good faith." *Shofner v. Shofner*, 181 S.W.3d 703, 719 (Tenn. Ct. App. 2004).

In this case, Wife has prevailed on appeal, and there is no evidence of bad faith on the part of either party. Wife argues that because she did not receive significant financial assets from the division of marital property, she does not have the ability to pay her attorney and therefore Husband should pay. We note, however, that Husband also did not receive significant financial assets from the division of marital property. We therefore do not feel it appropriate to make Husband responsible for the entire amount of Wife's attorney fees, and we accordingly order him to pay one-half of Wife's attorney fees on appeal.

The judgment of the trial court is affirmed. We remand this case to the Chancery Court of Sumner County for any further proceedings necessary. Tax the costs on appeal to the appellant, Harold E. Willmore, III.

PATRICIA J. COTTRELL, P.J., M.S.